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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

FLORENTINO NAVA,

Defendant and Appellant.

F070897

(Super. Ct. No. 10CM8642)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Karriem Baker, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Kane, J. and Franson, J.

INTRODUCTION

Appellant Florentino Nava was incarcerated at Avenal State Prison when he was found to be in possession of methamphetamine. In 2010, Nava pled no contest to a violation of Penal Code section 4573.6,¹ unauthorized possession of controlled substances in prison, a felony. He was sentenced to a four-year term in prison, to be served consecutively to the term for which he had been incarcerated. In 2014, Nava filed a petition for resentencing pursuant to section 1170.18, subdivision (a). The trial court denied the petition on the grounds a conviction under section 4573.6 is not eligible for resentencing. Nava appealed and appellate counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

On February 10, 2010, Nava's locker in Avenal State Prison was inspected by Correctional Officer Phillip Jensen. Jensen found salt and pepper containers; there was a latex balloon in the salt container and two balloons in the pepper container. The balloons held a white, crystal substance that testing determined was methamphetamine. The total amount was 10 grams, which was a usable amount.

On July 2, 2010, an information was filed charging Nava with a violation of section 4573.6, possession of a controlled substance in prison, a felony. The information also alleged that Nava had suffered a prior serious or violent felony, within the meaning of sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d). Nava entered a not guilty plea.

On September 22, 2010, Nava withdrew his not guilty plea and entered a no contest plea to a felony violation of section 4573.6, pursuant to a plea agreement. As part of the plea agreement, Nava agreed to a stipulated four-year prison term for the offense. In exchange for his plea, the People would move to dismiss the prior strike allegation.

¹ References to code sections are to the Penal Code unless otherwise specified.

The trial court struck Nava's prior conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

After verifying that Nava understood the consequences of his plea, knowingly waived his constitutional rights, there was a factual basis for the plea, and Nava was freely and voluntarily entering into the plea, the trial court accepted the no contest plea. The trial court imposed the stipulated four-year term, to be served consecutively to the term for which he had been incarcerated. Various fines and fees were imposed. The abstract of judgment correctly reflects the trial court's oral pronouncement of judgment.

On December 3, 2014, Nava filed a petition for resentencing under section 1170.18, subdivision (a). The People opposed the resentencing on the grounds that a section 4573.6 offense was not statutorily eligible for resentencing. The trial court denied the petition on the grounds the offense did not qualify for resentencing.

Nava filed a notice of appeal. Appellate counsel was appointed on March 6, 2015.

DISCUSSION

On April 7, 2015, appellate counsel filed a *Wende* brief in which no issues were raised. In his notice of appeal, Nava contends denying resentencing to those convicted under section 4573.6 violates constitutional principles.

Section 1170.18, subdivision (a), makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by ineligible defendants. These offenses previously were designated as felonies or wobblers. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) Under section 1170.18, a person who is currently serving a felony sentence for an offense that is now designated a misdemeanor may petition for recall of the sentence and resentencing. (*People v. Rivera, supra*, at p. 1092.)

Here, Nava was convicted of a violation of section 4573.6, which is not one of the offenses subject to resentencing under section 1170.18, subdivision (a), as it is not enumerated in the statute. Nava asserted exclusion of section 4573.6 offenses from resentencing eligibility violates his constitutional right to equal protection. Not so.

To establish an equal protection claim, a defendant must show “that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.” (*In re Eric J.* (1979) 25 Cal.3d 522, 530.) “Persons convicted of *different* crimes are not similarly situated for equal protection purposes.” (*People v. Macias* (1982) 137 Cal.App.3d 465, 473.) Here, Nava was convicted of a different crime than those crimes the people of California, through the initiative process, and the Legislature, through enactment of statutes, have deemed eligible to have their felony conviction reduced to a misdemeanor.

After an independent review of the record, we find that no reasonably arguable factual or legal issues exist.

DISPOSITION

The January 22, 2015, order denying the petition for resentencing is affirmed.